No. 10,229

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN SURETY COMPANY,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

for the District of Montana

BRIEF FOR THE APPELLEE

Honorable Charles N. Pray, District Judge

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Assistant Attorney General,

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McKEE PRINTING CO., BUTTE, MONT.

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BRIEF FOR THE APPELLEE

STATEMENT

This is an appeal by the American Surety Company, the only defendant below on whom service was effected, from the judgment entered against it by the Honorable Charles N. Pray, Judge of the United States District Court for the District of Montana, in a case tried to the Court without a jury. The opinion of the Court below is reported sub nom. *United States* v. *Grogan*, in 44 F. Supp. 871. Previous proceedings are reported in 39 F.

Supp. 819. The position of the parties is reversed from what it was below and hereafter in this brief defendant John V. Grogan will be referred to as the "contractor," defendant American Surety Company as the "appellant," and plaintiff as the government or the "appellee."

The action was brought to recover damages occasioned the United States by the failure of the contractor and his surety, appellant herein, to perform the terms of a written contract on U. S. Standard Form No. 23, Revised (Title 41, Code of Federal Regulations, sec. 12.23), between the contractor and the government, whereby the contractor agreed within a specified time to complete the construction of a certain building at Babb-Piegan, Montana, to be used as a United States Inspection Station, or to pay to the United States, as damages for his failure so to do, certain sums to be computed according to the provisions of the contract.

The Court below determined the disputed matters in favor of the United States in a written opinion disposing of the questions of law and entered findings of fact and conclusions of law holding the United States entitled under the contract provisions to recover the sum of $9,875 as liquidated damages for the delay of 395 calendar days in completing the contract, and the further sum of $2,044.04 as the additional cost sustained in completing the building by reason of the failure of the contractor and appellant, his surety to do so (R. 81). The Court accordingly gave judgment against appellant for these amounts with interest (R. 82) and this appeal was prosecuted (R. 84).

Appellant does not deny that the contractor had been delayed 473 days in the performance of the contract, that, accordingly, at his request and with appellant's consent the time for completion was extended to June 20, 1933, that when June 20 arrived the government elected to allow the contractor to continue with the work without any objection from appellant and it was not until thirteen months later on July 20, 1934, that the contractor's right to proceed was terminated.

It is equally conceded by appellant that the contractor and the appellant breached the contract with reference to the completion of the building on the terms agreed. It is believed that all the essential allegations of fact in the complaint, except as regards the amount of damages, are admitted either by the answer filed or by express admissions at the trial. Appellant's denials and assignments of error go only to the amount of damages the government may recover and not to the fact that the government was damaged.

APPELLANT'S CONTENTIONS

Appellant's brief urges only two main contentions; *first,* that the parties themselves had agreed as to the measure of damages in case of a breach in the obligation to complete the work, but the court applied a measure of damages different from that agreed upon when it permitted recovery of liquidated delay damages in addition to excess costs; and, *second,* that the parties themselves had limited the government's recovery to excess cost only and there was a failure on the part of the government to prove by competent evidence that there was any excess cost for completing the building, or the amount thereof.

Appellant does not appear to deny federal law is exclusively applicable[1] and that under the law of the United States the parties could provide for liquidated delay damages in the contract. It could not well do so in view of the statutory provision requiring the provision (40 U. S. C. 269) and the applicable decisions of the Supreme Court. *Sun Printing and Publishing Association* v. *Moore,* 183 *U. S.* 642; *Wise* v. *United States,* 249 U. S. 361; *J. E. Hathaway and Co.* v. *United*

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1. The Court below expressly held in denying appellant's motion to strike. **United States** v. **Grogan,** 39 F. Supp. 819, 820. To the same effect see **Erie R. R. Co.** v. **Tompkins** (1938), 304 U. S. 64, 78; **United States** v. **National Surety Co.** (1940), 309 U. S. 165, 169; concurring opinion of Jackson, J., in **D'Oench, Duhme and Co.** v. **F. D. I. C.** (1942), 315 U. S. 447, 468-472; **United States** v. **Clearfield Trust Co.** (1942, C. C. A. 3), 130 F. (2d) 93, 94; **Kemp** v. **United States** (1941, D. C. Md.), 38 F. Supp. 568, 571. Compare **Byron Jackson** v. **United States** (1940, S. D. Calif.), 35 F. Supp. 665, 667-668; **Cox** v. **United States (1832),** 6 Pet. 172, 203; **Duncan** v. **United States** (1833), 7 Pet. 435, 449.

States, 249 U. S. 460. Appellant likewise appears to admit that it is lawful for parties freely to contract as to the measure and proof of the damages to be recovered in the event of a breach of the principal obligation of the contract and that such is the law is established by the decision of this Court. *United States* v. *Harris,* 100 F. (2d) 268, 278. Finally, it is not believed that appellant seeks to deny that where the law of the United States is applicable the parties may by apt language provide for the recovery of both excess cost and liquidated delay damages. *Southern Pacific Co.* v. *Globe Indemnity Co.* (C. C. A. 2), 21 F. (2d) 288, 291, further pro. 30 F. (2d) 580, cert. den. 279 U. S. 860; *Six Companies* v. *Joint Highway District* (C. C. A. 9), 110 F. (2d) 625, rev. on other grounds 311 U. S. 180, 187; *Reading* v. *United States Fidelity and Guaranty Co.* (E. D. Pa.) 19 F. Supp. 350.

It thus appears appellant's first main contention is simply a complaint that the Court below incorrectly construed and applied the language of Article 9 to the situation of fact presented by the case at bar. The government, on the other hand, maintains the construction adopted by the Court below is the only natural and correct one while that urged by appellant does not adequately deal with the different situations which may be presented and is unworkable in practice.

Appellant's second main contention is that the government was limited by the terms of the contract to the recovery of excess cost, but that as a condition of doing so it must affirmatively show its expenditures were rea-

sonable and must negative any possibility that the work under the completion contract differed in any particular from that of the defaulted contract. Appellant does not appear, however, to be seeking to deny that the government's expenditures were reasonable. It could not well do so since the completion contract was awarded to the low bidder in accordance with appellant's own request and the applicable statutes and regulations.

It accordingly seems appellant's second main contention is confined to the objection that the Court below should have required the government to establish by affirmative evidence, as part of its case in chief, that the work under the completion contract differed in absolutely no particular from the work not performed under the defaulted contract. The government, on the other hand, maintains the burden is on appellant to establish any deviations from the work specified under the original contract once the government has shown the completion contract was deemed and intended by the contracting officer to be for completing the work not performed under the defaulted contract.

ARGUMENT

I

Liquidated delay damages at the contract rate for the period from the completion date of the contract to the date the contractor's right to proceed was terminated were correctly allowed by the Trial Court.

Appellant challenges as erroneous, however, the construction which the district court placed upon the contract provisions concerning damages. It is common ground to appellant and appellee alike that the contract is plain and unambiguous leaving no room for interpretation and that accordingly the only duty of the court below was to enforce the contract by applying its provisions to the facts. Appellant and the government do not, however, agree on the meaning of the contract in the situation involved in the case at bar.

It does not necessarily follow, of course, because the parties cannot agree upon the proper construction to be given the terms of the contract that it is not plain or must be ambiguous. *Andrew* v. *St. Louis Joint Stock Land Bank,* (C. C. A. 8) 107 F. (2d) 462, 468. The Court in the enforcement of a contract of necessity must determine the meaning of the parties and by its enforcement give effect to their intent, but to carry that intent to its culmination the intent must, as this Court held, be determined from the language and the purpose of

the parties in making the agreement. *First Seattle Dexter Horton National Bank* v. *Commissioner of Internal Revenue, 77* F. (2d) 45, 48. Such is the principal problem presented on this appeal.

In determining the intent, it is necessary to take the contract by it four corners, read all of it, giving effect to all its parts, and consider the object of the entire contract, the purpose of the particular clause, and the circumstances of the parties at the moment of entering into it. The contract, executed on U. S. Standard Form No. 23, Revised (Title 41, Code of Federal Regulations, Sec. 12.23), is found at page 9 of the record. Upon reading it, it is plain that its object was the construction of a building at the United States Inspection Station, Babb-Piegan, Montana, within a time certain specified in the contract for a price therein specified. It further appears that at the time of making the contract the parties contemplated the possibility of default by the contractor through not completing the construction of the building within the time stated in Article 1 (R. 10) or even at a later date. In the exercise of ordinary prudence and in accordance with the statutory requirement (40 U. S. C. 269) they therefore included in the contract Article 9 (R. 15) imposing certain rights, obligations, and liabilities in case of the contractor's failure to complete, on the meaning of which article the instant case turns.

Article 9 falls into two separate and distinct parts, the first part defining the measure of damages in the event the government elects to terminate the contractor's

rights for failure to make proper progress or to complete the construction of the building within the time specified by Article 1, the second part imposing on the contractor the obligation of continuing the work and of paying liquidated delay damages for the delay until the work is completed in the event the government elects not to exercise its right of termination for failure to complete within the specified time. It is thus obvious that both parts of Article 9 together are intended to cover the three distinct situations: (1) Where before the date for completion the government elects to terminate the contractor's right to proceed and takes over the work itself or by a completing contractor; (2) where the government elects to allow the contractor to continue with the work after the date specified for completion and the contractor finishes the work late; and (3) where the government elects to allow the contractor to continue with the work after the date specified for completion but the contractor fails to finish the work even at a later date than that specified in the contract.

It is common ground to appellant and the government that the construction work called for by the contract was not completed by June 20, 1933, the time specified by Article 1; that when the time specified arrived the government elected not to terminate the contractor's right to proceed but permitted the contractor to continue with the work, and that, the contractor and appellant his surety not having completed the work for thirteen months thereafter, on July 20, 1934, the government was compelled to take over and complete the

work by another contractor. It must therefore be conceded that the situation presented on this appeal is that described in (3) above.

Appellant's position in this respect is that the two clauses of Article 9 furnish only two rules to apply although there are three distinct situations with which the parties were obliged to deal in contracting. Appellant contends that Article 9 deals with the measure of damages to be recovered under the contract exclusively and that the government has only a right of election between two alternative measures of its damages, (a) general damages for its actual loss, in the form of the excess cost of completing the work, or (b) special damages for the inconvenience to the public service by the delay, in the form of liquidated damages at the rate specified. Appellant appears to deny that the article imposes an obligation on the contractor of continuing the work to completion in the event that the government elects to allow him to proceed after the date specified in Article 1, and that for the breach of this additional obligation the government may recover its actual damages without forfeiting its right to the liquidated delay damages. The government maintains that appellant is confused as to the effect of the article and its full scope, intent and purpose, and that the meaning of the language is obvious once the situations involved are understood. The government admits that the few reported cases on the point are inconsistent with each other, but maintains that the clearer, more cogently reasoned decisions are in accord with that of the court below.

1. *The language of the article, examined in the light of the situations with which its draftsmen dealt, supports the action of the Court below in holding the Government entitled to liquidated delay damages as well as the additional cost of completing the work.*—To understand the meaning of the language of Article 9 of the U. S. Standard Form construction contract, it is only necessary to review the law and statutes applicable to the three obvious and distinct situations for which the draftsman was required to provide.

The general principles of law applicable are elementary. Where a contractor fails to perform the work within the time specified or a reasonable time thereafter, the owner or purchaser may recover both general damages for the value of his bargain and special damages for consequential losses, the probability of which the contractor should reasonably have known.[2] In the case of a defaulted construction contract this means the cost to the owner of completing the work and the monetary value of the use of the construction from the date it should have been completed to the date it was actually finished.[3] However, in the event the owner, claiming want of proper progress by the contractor, takes over the work before the specified completion date, the contractor is not

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2. The most familiar form of the principle is the rule in **Hadley** v. **Baxendale,** 9 Ex. 341, that in cases involving sale of goods, in the absence of a special contract provision, plaintiff must prove both the consequential damage and the fact that defendant knew or should have known of its possibility.

3. See 3 Sutherland, **Damages** (1916), pp. 2592-2596, and secs. 702-704; **McMullen** v. **United States,** 222 U. S. 460, 471.

liable for damages of any kind whatever.[4]

Besides taking into account these common law principles, the draftsman was moreover required by the act of June 6, 1902, c. 1036, Sec. 21, 32 Stat. 326 (40 U. S. C. 269), to insert in the contract a stipulation for liquidated damages for delay in addition to the actual damages sustained by the government in completing the work.[5]

In view of these legal circumstances the contract provisions required of the draftsman seem fairly obvious.

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4. See **Stone and Gravel Company** v. **United States,** 234 U. S. 270, 277-280; **United States** v. **O'Brien,** 220 U. S. 321, 327.

5. The statute as proposed by the Treasury Department and enacted without any debate by the Congress provides: "In all contracts entered into with the United States for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; and the Secretary of the Treasury is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable; and in all suits commenced on any such contracts or any bonds given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties." The letter of the Secretary of the Treasury dated February 3, 1903, transmitting the proposed legislation to the House Committee on Public Buildings and Grounds (House Report No. 1794, 57th Cong., 1st Sess., vol. 4405 reprinted House Debates, April 29, 1902, 35 Cong. Rec. 4835) stated: "When contracts are awarded for the construction or repair of public buildings under the control of this Department it sometimes happens that, having a due regard for the convenience of the Government, the moving consideration for the acceptance of a particular bid is the time within which the bidder agrees to complete the work embraced in his bid, and where, under those circumstances, the Government buys time, so to speak, and lets work to a bidder based on the consideration of time being of the essence of the contract, it is unjust to the United States and unfair to competing bidders to say that recovery shall be had for no more than the actual damages sustained by the United States and that the element of inconvenience to the public and the Government in being deprived of the use of the public building shall not be considered. The attitude of the courts in favor of construing as penalties wherever possible all stipulations for liquidated damages is founded upon principles which in the main are humane and just, but it results in rendering possible, under certain circumstances, the most vexatious delays, with no other remedy, on the part of the Department, than the abrogation of the contract and the re-letting of the same, a method in itself always attended with more or less delay."

As indicated before, three distinct situations of fact must be provided for: (1) where before the completion date the government takes over the work, (2) where the contractor is permitted to finish late, and (3) where the contractor although permitted to continue after the completion date fails to finish within a reasonable time and the government is obliged to finish the work itself.

To provide for the case where before the specified completion date the government desires to take the work out of the contractor's hands because of his failure to make proper progress, *the first situation,* the draftsman of the Standard Form contract was obliged to exclude the operation of the common law rule releasing the contractor and his sureties from liabilitiy for the cost of completing the work. The draftsman accordingly prescribed in the first part of Article 9, that:

> *If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time,* the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his surety shall be liable to the Government for *any excess cost occasioned the Government thereby.* If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. (Italics supplied.)

To provide for the cases where the contractor is permitted to continue after the specified the completion date, and either, *the second situation,* finishes after a delay, or, *the third situation,* fails to finish within a reasonable time so that the government is compelled to take over and complete the work, the draftsman of the Standard Form was required to give effect to 40 U. S. C. 269 and include a stipulation for liquidated delay damages but could rely on the common law rule that the contractor allowed to continue but failing to finish is liable for the actual cost of completing the work. The draftsman accordingly prescribed in the second part of Article 9, that:

> *If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work,* in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the government as fixed, agreed and *liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications,* or accompanying papers and the contractor and his sureties shall be liable for the amount thereof; . . . (Italics supplied.)

Under the provisions of these two parts of Article 9, if the contractor fails to complete the work within the time specified, the government must elect to do one of two things: it may by written notice terminate the contractor's rights to proceed further with the work and claim the rights conferred by the first part of the article,

but it must do it at once at the time of the original breach and before the specified completion date. It may instead, on the other hand, allow him to continue with the work, but if it does so it loses the rights given by the first part of the article and takes only those conferred by the second part. The government has the right to elect which of the two courses it will follow and its choice is not dependent upon the rights or desires of the contractor or his surety in any respect whatsoever. It lies completely with the government, but it may be exercised only once and after the specified date for completion, the government may not claim the rights under the first part, but is confined to the recovery of the stipulated liquidated delay damages and the right implied by the common law to have the building finished within a reasonable time. The effect of the two provisions in the three situations may accordingly be succinctly stated.

(1) *Where before the completion date the government takes over the work.*—If the government by written notice terminates the contractor's right to proceed, it may cause the work to be completed either by reletting the contract or by doing the job itself. It may, without compensation to the contractor, take possession of and utilize in completing the work all materials, appliances, and plant which the contractor may have at the site of the work and, in addition, may recover from the contractor and his surety the amount of any additional cost in completing the work.

(2) *Where the contractor is permitted to continue and finishes late.*—The article's second part, previously dormant in the contract, comes into operation by the government's election to allow the contractor to continue after the specified completion date. By its choice the government obtains the contractor's obligation to continue the work, to pay liquidated damages for the delay in completion, and, impliedly, to complete it within a reasonable time. The government forever forfeits, however, its rights under Article 1, to have the work completed by a particular date, and those it might have exercised under the first part of Article 9.

(3) *Where the contractor permitted to continue fails to finish the work.*—By the government's election to allow the contractor to continue after the completion date, its rights under Article 1 and the first part of Article 9 disappears forever from the contract. It is no longer entitled to have the work completed by the date specified, nor to terminate the contractor's right for mere failure to show sufficient progress and take over the work together with all materials and equipment and complete performance at the contractor's expense. The government obtains instead, however, the new rights conferred by the coming into force of the second part of Article 9. It may recover stipulated liquidated damages for the delay, and the contractor is under obligation to continue work. Since no particular time is specified, the law implies that the work will be completed within a reasonable time.

Crossland v. *Kentucky Bluegrass Co.,* (C. C. A. 6), 103 F. (2d) 565, 567;

American Concrete Steel Co. v. *Hart* (C. C. A. 2), 285 Fed. 322, 327;

Roswell Drainage District v. *Dickey* (C. C. A. 8), 292 Fed. 29, 32.

Since no particular measure of damages is specified for the conrtactor's failure to finish the work within a reasonable time, the common law gives the government the right to recover the additional cost of completing the work (see, *supra,* note 3), in addition to the right to liquidate delay damages expressly stipulated for.

In the light of this analysis of the situation of fact and law for which the draftsman was providing, it is submitted that the decision of the Court below is correct in refusing to read into Article 9 the forfeiture urged by appellant. The Court's construction is in accordance with the plain and ordinary meaning of the article's language and gives effect to the common law principle that to make whole the party injured by such a default the law give both general damages in the form of any additional cost and special damages in the form of the value of the use and occupation of the building.

2. *The more cogently reasoned decisions of the federal courts supports the action of the Court below in holding the government entitled to liquidated delay damages as well as the additional cost of completing the work.*—As stated before, the contract involved is the U. S. Standard Form No. 23, Construction Contract (Title 41, Code of Federal Regulations, Sec. 12.23) used

by the government without substantial change since November 19, 1926. In all that time, however, the present question so far as is known has been before only two Circuit Courts of Appeal and only twice before the United States Court of Claims. The resulting decisions are evenly divided. The decision of the Court below is in accordance with the decision of the Court of Appeals for the Fifth Circuit and of the first decision on the subject of the United States Court of Claims. The contention of appellant herein is in accordance with a decision of the Court of Appeals for the District of Columbia and of a later decision by the United States Court of Claims in which the Court was divided three judges to two. In view of this conflict of authority, it would appear clearly the right and duty of this Court to determine the question for itself.

The contention of appellant in the instant case that terminating the contract extinguishes the right to liquidated delay damages and confines the government to recovery of excess cost alone was first made in *American Employers' Insurance Co.* v. *United States* (1940), 91 Ct. Cls. 231, 238. There the contractor was required to complete certain units of the work by January 19, 1933, and the entire contract by April 19, 1933. The first units were completed twenty-eight days late but were accepted February 16, 1933, or before the contractor stopped work on February 24, 1933, as well as before the date his right to proceed was terminated. The right to proceed was terminated March 7, 1933, or forty-three days prior to April 19, 1933, the date for

completion of the entire contract. The amount originally deducted by the contracting officer for liquidated delay damages on that part of the work taken out of the contractor's hands before the completion date was remitted by the government in accordance with the established rule,[6] but when the contractor sued in the Court of Claims, the government set up a counterclaim for that amount of the liquidated delay damages which had accrued for the twenty-eight days' delay in completing the first units of work. The Court of Claims adopted the government's contentions, saying (p. 239):

> "In the case now before us the assessment of liquidated damages for the failure to complete the first unit was within the terms of the contract and was due when plaintiff undertook to complete the contract work.
>
> "The liquidated damage clause disappears from the contract after the contract was cancelled by the government, not before."

Thus in the first case involving the situation where the government elects to allow the contractor to continue with the work after the date specified for completion but later is obliged to take over and complete the job its right to recover both liquidated delay damages and excess cost was sustained.

The question was next presented to the Court of Appeals for the Fifth Circuit in *Continental Casualty Co.* v. *United States,* 113 F. (2d) 284. In that case the

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6. **Stone & Gravel Co.** v. **United States,** 234 U. S. 270, 277-280; **Fidelity & Casualty Co.** v. **United States,** 81 Ct. Cls. 495; **Commercial Casualty Ins. Co.** v. **United States,** 83 Ct. Cls. 367.

district court entered judgment against the surety for liquidated delay damages and excess cost exactly as the Court below did in the instant case. The question was discussed by counsel on the argument in the district court, but the contention made by appellant in the instant case was not forcibly insisted upon and the district court in its opinion (*United States* v. *Continental Casualty Co.* (1939, E. D. La.), 29 F. Supp. 598, 601), confined itself to saying:

> "Under the terms of Article 9 of the contract and paragraph 3 of the specifications, liquidated damages at the rate of $20.00 per day on each item are chargeable against the original contract from the day following the nominal date of completion to and including the date of default or termination of the contract.
>
> "The uncontroverted evidence adduced at the trial shows that the cost of readvertising and reletting the work and the excess cost for job overhead, area, division and district overhead in the amounts claimed by the government constitute an item of damage actually sustained by the government."

The district court accordingly declared that the amount of the excess cost and the liquidated delay damages due the United States were as stated in the complaint and that the defendant had not offered any evidence to show that the work could have been done at a cheaper price. It continued:

> "On default of the Grasser Contracting Co. the rights of the United States and the liability of the Continental Casualty Co. became fixed. (Citing

> cases.) The action of the contracting officer in terminating the right of the Grasser Contracting Company to proceed with the work was not a cancellation or annulment of the contract."

On appeal the surety company, as appellant, did not contend that the provisions of Article 9 prevented recovery of both excess cost and liquidated delay damages as is urged by appellant in the instant case. Instead it was argued that the government acted unreasonably in failing to terminate the contract at the date fixed for completion and allowing the contractor to continue with the work although he failed to make reasonable progress. The action of the district court was affirmed by the Fifth Circuit Court of Appeals, the Court saying at pp. 285-286:

> The government filed this suit to recover such excess from the surety, together with the sum of $620.00 as liquidated damages under the contract for the delay in completion of the work beyond the contract date down to the date of the bankruptcy. * * * When the contractor defaulted in the performance of the contract by filing the petition in bankruptcy, the rights of the government and the liability of the surety under the contract immediately became fixed.
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> * * * * * * *
>
> The fact that the government permitted the contractor to continue the work after the period for completion had expired is no reason to deny it the damages expressly provided by the contract for such an occurrence.

Thus in the second case involving the situation presented by the case now at bar, the right to both liquidated delay damages and actual additional costs was again sustained.

The question was presented for the third time in *Maryland Casualty Co.* v. *United States* (1941), 93 Ct. Cls. 247, 254. In that case, a court divided three judges to two held that by taking over the work the government forfeited its right to liquidated delay damages even though they were already accrued and vested. The three majority judges cited cases holding that in the situation, where the contractor was prevented from completing the work by termination before the specified completion date, liquidated delay damages cannot be recovered (see *supra,* note 6) and declared the Court's own previous decision in the *American Employers' Insurance Co.* case, *supra,* involving the identical situation, was distinguishable in that the several units of the work constituted separable parts of a divisible contract. They also sought support in United States v. Maryland Casualty Co. (D. C. Me.), 25 F. Supp. 778, a case decided under an entirely different form of contract.[7] The other two judges, however, rejected the decision of the three majority judges in separate dissenting opinions. The minority accepted the government's contention adopted by the Fifth Circuit and the Court of Claims own decision in the *American Employers' Insurance Co.* case that termination after the specified completion date operated to exclude further liquidated delay damages, but did not forfeit the vested right to delay damages which

had accrued between the completion date and the termination.

Judge Whitaker conceded that the right to liquidated delay damages and to excess cost were alternative but denied that a termination after the specified completion date acted retroactively to forfeit liquidated delay damages already accrued. Said Judge Whitaker (pp. 256-257):

> When the plaintiff in the case at bar failed to complete his contract on time the defendant chose to allow him to continue the work. In such event, the contract expressly provides that the contractor shall become liable to the defendant for damages for the delay in a stipulated sum per day. His failure to complete the work on time was a continuing default until the work was actually completed. This default continued for ninety-one days, whereupon, the defendant availed itself of the other remedy provided for, to wit, terminating the contractor's right to proceed further and then taking over the work itself.
>
> Upon the termination of the contract the pro-

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7. In view of the reliance placed upon the district court case by both the majority of the Court of Claims and the Court of Appeals for the District of Columbia in the Cunningham case, it must be pointed out that it was not a case involving a contract for construction nor was the U. S. Standard Form No. 23, involved in all the other decision, employed. The contract was for the removal of a sunken barge from tidewater and towing it out to sea to be sunk in deep water. The government sustained no conceivable damage as a result of the delay except the actual cost of reletting the contract, plus expenses for inspection, superintendence, etc., payment of which were expressly provided for in both the article relating to delay damages and that relating to total failure of performance. The citations of the district court suggests he based his decision on the supposed rule that in no event may both liquidated delay damages and excess cost be recovered. (See **Six Companies v. Highway District**, 311 U. S. 180, 187, holding such is the California law and reversing the decision of this Court, 110 F. (2d) 620.) As it appeared that in the circumstances of the case the so-called liquidated delay damages were in fact a pure forfeiture, despite the statement in the contract that they should not be regarded as a penalty, the Solicitor General directed no appeal.

> vision for liquidated damages was no longer operative under our decisions in the cases cited in the majority opinion, but until the contract was terminated, this provision was operative. We have never held to the contrary. In none of the cases cited in the majority opinion was the contractor permitted to proceed beyond the limit of the contract period; hence, the proviison for liquidated damages never became operative. But in this case it did become operative. It becomes inoperative only upon the date that the defendant cancels the contract.
>
> It is my opinion, therefore, that the defendant is entitled to collect the stipulated damages from the expiration of the contract period to the date of termination and, in addition, is entitled to collect the excess cost incurred incident to its completion of the work.

Judge Madden, however, was unwilling to regard the right to liquidated delay damages and the right to excess cost as in any sense alternative. He appears to have been impressed with the fundamental common law distinction between general damages for the loss of the benefit of the contract and special damages for the loss suffered as a result of not obtaining the work on time. Said Judge Madden (p. 257):

> The provision of the contract for liquidated damages for delay, and the other provision for recovery of excess costs if the work is completed by the government, are not alternative provisions and are not aimed at the same default on the contractor's part. If the contractor completes the work late, the government gets the structure at exactly the contract price. But it has been denied the use of the structure for the period of the delay and hence gets the

> liquidated damages as compensation, the actual damages being agreed as being "impossible to determine." The government has suffered no addition to the contract price, but that does not prevent it from obtaining compensation for the default that has occurred, viz., the delay.

He then explained the reason which he believed had led the parties to exclude liquidated delay damages for the period following the termination of the contract and referring to the action of the majority in reading into the contract a provision for forfeiture declared: "I see no reason for reading into the contract a provision which is not there, when the ends served by such interpolation are neither equitable nor otherwise desirable."

The last decision on the question is that of the Court of Appeals for the District of Columbia in *United States* v. *Cunningham,* 125 F. (2d) 28, 31, upon which the appellant in the instant case principally relies. So far as the question principally involved on the present appeal is concerned, the situation of fact presented in the *Cunningham* case is on all fours. When the date specified for completion arrived the government did not terminate the contractor's right to proceed, but allowed him to continue for nearly two months thereafter when, the contractor having failed to make any substantial further progress, the government was compelled to take over the work. The Court of Appeals followed the same reasoning as the Court of Claims majority in the *Maryland Casualty* case and declared that Article 9 gave the United States an election between two rights which were

not only alternative but exclusive. It did not cite that case, but instead cited *Fidelity and Casualty Co.* v. *United States* 81 Ct. Cls. 495 and *Commercial Casualty Insurance Co.* v. *United States,* 83 Ct. Cls. 367, neither of which involved the situation where the contractor was allowed to continue after the completion date. It attempted to distinguish the *American Employers' Insurance Co.* and the *Continental Casualty Co.* cases just discussed herein and like the majority judges of the Court of Claims in the *Maryland Casualty Co.* case relied heavily on the decision of the district court in *United States* v. *Maryland Casualty Co.,* 25 F. Supp. 778, 780 (*supra,* note 7). The Court ignored the difference between cases of termination under the first part of Article 9 before the specified completion date and failure to finish although allowed to continue thereafter. It rejected without discussion the government's contention that when the contractor is allowed to proceed after the date specified he is under obligation to continue and conclude the work and that for breach of this obligation the government may recover actual damages. The Court said (p. 31):

> The deduction was made under Article 9, by the terms of which the contractor was required to prosecute the work to completion within the specified time, failing which the United States was given two rights—*one,* to take over the work and complete it and hold the contractor for any excess cost; *the other,* to permit the contractor to continue the work subject to the right of the United States to retain out of the contract price liquidated damages for each calendar day of delay until the work should be completed.

Before the decision in the *Cunningham* case was handed down and before final action on the Court of Claims decision by a divided court, Judge Pray decided the motion to dismiss the government's complaint filed in the instant case in accordance with the government's contentions (39 F. Supp. 819, 821). Since the amount involved in the Court of Claims *Maryland Casualty Co.* case and the *Cunningham* case both together was only $5,000, the Solicitor General after careful consideration determined that pending final decision of the instant case the importance of the question did not require petitioning the Supreme Court for certiorari to settle the point.

It is submitted that the more cogently reasoned opinions support the decision of the Court below in the instant case. Nothing either in the opinion of the Court of Appeals for the District of Columbia in the *Cunningham* case or in the majority opinion of the Court of Claims in the *Maryland Casualty Co.* case overcomes the clear reasoning adopted by Judge Pray in the case at bar in reaching the same conclusion as the Court of Claims minority judges, the Fifth Circuit, and the Court of Claims itself in its earlier decision in the *American Employers'* case. Neither does either opinion afford an answer to the objection of Judge Madden that the construction urged upon the court by the various surety companies requires reading into the terms of Article 9 an implied forfeiture of the government's vested right to the liquidated delay damages accrued between the specified completion date and the time the work is taken out of the contractor's hands. Indeed, as already pointed

out in this brief, such a construction involves not alone the reading into the article an implied intention to forfeit a vested right, but also ignoring the express obligation that if the contractor's right to proceed is not terminated at or before the specified completion date he will continue the work to completion within a reasonable time.

3. *Appellant's proposed construction of Article 9 fails to provide for all three of the situations in which the parties may find themselves, and is unworkable in practice.*—Appellant urges this Court to reject the construction adopted by the Court below, and by the more cogently reasoned of the other opinions on the question, and to adopt the contrary construction for what appears to be substantially the reasons given by the Court of Appeals for the District of Columbia in the *Cunningham* case. The Government submits that not only does such a construction fly in the face of the familiar rule that forfeitures will not be implied, but in addition it produces a result which is arbitrary and unworkable.

It is submitted that the construction advocated by appellant and the District of Columbia Court is based upon confusing the second and third situations which may arise through the contractor's default. It assumes that if the United States permits the contractor to proceed he must inevitably complete the work and the government will then deduct liquidated delay damages from the time of his original breach by failure to complete on time until the time he finishes the work. That this

interpretation of appellant's position is correct is confirmed by its statement at page 9 of its brief that:

> Under the plain language quoted, supra, of Article 9 of the construction contract there is no right in the government to liquidated damages of $25 per day for delay unless the government *does not terminate* the right of the contractor to proceed. (Appellant's italics.)

That this is equally the position of the District of Columbia Court appears when it says that the United States was given the alternate right "to *retain* out of the contract price" the liquidated delay damages. Retention cannot, of course, be effected unless the contractor finishes the work.

This construction, urged by appellant in place of that adopted by Judge Pray in the case at bar, overlooks that the assumption that the contractor must necessarily finish is entirely unwarranted. It is inconsistent with the language of Article 9 that the contractor *"shall pay to the government* as fixed, agreed, and liquidated damages" the amount specified and that "the contractor *and his sureties* shall be liable for the amount thereof." The draftsman of the article recognized by this language that in addition to the cases where the delay damages could be retained from the contract price—the only situation contemplated by the *Cunningham* case construction, and now urged on this Court by appellant—there is the other situation where the contractor fails to complete the work and affirmative recovery, possibly from his surety, would be necessary. If appellant and

the District of Columbia Appeals Court were correct, liability of the surety would be unnecessary since the Government could always deduct and retain its delay damages out of the contract price.

Carried to its logical conclusion, appellant's proposed construction absolutely nullifies the provision for payment of liquidated delay damages in any case where the contractor, although allowed by the government to continue, ultimately refuses to finish. If the right to delay damages is conditioned upon the government's never taking over the work no matter how long the contractor's delay nor what the reason for it, then in every case the contractor and his surety can avoid liability for delay damages by the easy expedient of refusing to fulfill their obligation to continue the work, stopping just short of completion, and forcing the government to take over.

Appellant and the District of Columbia Court appear to concede that, if the work is not completed within the time originally agreed, the government has the right freely to elect to permit the contractor to continue and recover the stipulated damages for his delay. Under the *Cunningham* decision and the appellant's contention, however, the government's choice is only apparent and not real for the contractor can always defeat it since he must continue or the damages are forfeit. The effect of such a construction is that the government can recover only if *the contractor* elects to permit it to do so. He has only to stop at any time before completion and the government despite its previous election, can recover no delay. As the result of his stoppage the government

has a partially completed building for which the public has absolutely no use. As the contractor proceeded with the work, the government has paid him progress payments which may amount to almost the entire contract price. The delay may have been a month, or it may have been thirteen months as in the instant case. Yet what has the government gotten by its election to allow the contractor to proceed and what is it to do? An unfinished building is of no value to the public. It was not what the government contracted for nor what it requires. The contractor knows the government cannot and will not, in the public interest, allow the building to stand permanently unfinished. It must complete the work itself. Under appellant's contentions and the decision of the Court of Appeals of the District of Columbia, however, the moment the government commences to finish the buliding, a forfeiture occurs which relieves the contractor and his surety of all obligation to pay the liquidated damages which have accrued during the delay, and the government has only the right it elected not to exercise—to complete the building and recover the additional costs, if any. By quitting the contractor has deprived the government of its right to recover the agreed damages for the loss and inconvenience occasioned the public by the contractor's failure to finish the building when he agreed.

The District of Columbia Court of Appeals declares and appellant does not deny that the government has a choice of alternatives. A choice would presuppose a freedom of election by the government uncontrolled by

any act of the contractor or his surety. The result reached by the construction contended for, however, does not bear out the pronouncement, when the contractor by simply quitting before the building is finished can compel the government to complete it and work a forfeiture whereby he is released from his obligation to pay liquidated damages. Instead of the choice being given to the government it rests entirely with the contractor. It cannot be denied that the refusal to finish the building is a wrongful act of the contractor, yet if appellant and the District of Columbia Court are correct, it constitutes a case where a benefit may be obtained by reason of a wrongful act.[8]

It is submitted that such a construction of the parties' agreement is unworkable to the point of absurdity. The only reasonable meaning of the contract would seem to be that when the contractor breaches the obligations im-

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8. Cf. Madden, J., dissenting in **Maryland Casualty Co.** v. **United States, supra,** 93 Ct. Cls., at 258: "So long, however, as the work is left in the hands of the contractor, the delay in completion is his sole responsibility, and there is no reason why he should escape the agreed remedy for it by the easy expedient of prolonging it to a time when the government, needing the facilities contracted for, must take over and complete the work. If this becomes the established doctrine, the practice of the government, often advantageous to both parties, of refraining from taking over the work even though it seems certain that it will not be completed on time, in the hope that the contractor, spurred by the liquidated damages clause, will bend every effort toward a completion as soon as possible after the time, will no longer be prudent, since the contractor can often serve his interests better by doing nothing and thus compel the government to take over the work and forfeit the liquidated damages already accrued than by proceeding diligently. I see no reason for reading into the contract a provision which is not there, when the ends served by such interpolation are neither equitable nor otherwise desirable." See also this Court's decision in **Six Companies** v. **Joint Highway District,** 110 F. (2d) at 625, that: "It is not for delay in completion of the work that the damages are provided. The clause does not in terms or by implication empower the contractor to put an end to the accrual of liquidated damages by the mere process of refusing to go ahead after the time for completion has passed."

posed upon him by the second part of article 9, which came into force by the government's allowing him to continue, the government has the remedy the law gives for the breach of any contract; the right to be placed in as nearly the same position as possible. By the ordinary meaning of the article's second part, the government is entitled to the completed building and also to the value of the use and occupation of the building for the period of delay, stipulated, for convenience of proof, to be $25 per day. Had the contractor performed his obligation, even appellant concedes, the government would have its completed building, and in addition the right to retain the agreed damages of $25 for each day's delay. Appellant cannot deny that the contractor breached his obligation to complete the building and forced the government to do it. It is only reasonable, then, that besides the agreed value of the use and occupation, the government should also receive the equivalent of the completed building, that is to say, the additional cost of completing it.

There can be no question that the law established by this Court and by the Supreme Court is to the effect stated. *United States* v. *Harris,* (C. C. A. 9) 100 F. (2d) 268, 277; *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.,* 253 U. S. 97, 100; *Wicker* v. *Hoppock,* 6 Wall. 94, 99. Upon breach of the contractor's obligation the government is entitled to be put in the situation it would have been in had the breach not occurred. If the contractor does not give the government a completed building, it cannot be in the position

it would have been in had the contractor fulfilled his obligation. If the contractor fails or refuses to complete the building, the government, being entitled to a completed building, is entitled to complete the building itself at the contractor's expense; in other words, to recover any excess cost it may be put to in finishing the work. When it recovers excess cost, its general damages due to the contractor's failure to deliver the building have been paid. It has the completed building for which it bargained. It has not, however, recovered all the damages it sustained as the proximate result of the contractor's breach. It has not been compensated for its special or consequential damages by reason of the loss of the use and occupation of the building during the time it was rightfully entitled to use and occupy it. It retains, therefore, its right to recover from the contractor the value of the use and occupation which he expressly agreed to pay at the rate of $25 per day for each calendar day's delay in the delivery of the completed building. Only when it receives such liquidated delay damages has it recovered all the loss which it sustained by the contractor's wrongful act.

It is submitted, therefore, that the construction, contended for by the appellant and adopted by the Court of Appeals in the *Cunningham* case, falls into error by holding the government entitled to receive more when the contractor performs faithfully and less when he defaults wrongfully. The result is absurd and can be arrived at only by doing violence to the contract terms. It is necessary to ignore the provision of Article 9, re-

quiring the contractor to continue the work if the government permits him to do so, and to read into the article a provision whereby the government's right to delay damages is forfeited whenever it is compelled to finish the work by the contractor's wrongful refusal to do so. The correct and just principle of construction is to take the language of the contract in its ordinary and natural meaning and to give effect equally to all its parts. *E. I. du Pont de Nemours and Co.* v. *Claiborne-Reno Co.* (C. C. A. 8) 64 F. (2d) 224, 227-228, cert. den. 290 U. S. 646. This the Court below did in the construction which he adopted and there is no answer to the reasoning of his opinion. See esp. 44 F. Supp. at 872.

II

Appellant and not the government had the burden of establishing whether or not the specifications for the completion contract deviated materially from those for the unperformed part of the defaulted original contract.

Appellant's second and, it would seem, decidedly subsidiary contention is that the action of the district court in awarding the government the additional cost of completing the building is not supported by evidence because there was insufficient proof that the completion contract was "in accordance with the specifications, plans and drawings of the Grogan contract." ((Appellant's brief, pp. 20-22.) Appellant urges that all the government's evidence as to the amounts it paid for the performance

and supervision of the completion contract, including appellant's own admissions on the point, was irrelevant and inadmissible because the government's proof failed to sufficiently establish the identity of the completion contract with the unperformed part of the defaulted contract.

The record shows, however, that the contracting officer[9] gave appellant notice (Ex. 8, R. 41) that a government construction engineer would take inventory of the state of the work and invited appellant to have a representative present. Appellant was also requested to advise whether it desired to complete the work. Appellant made no reply concerning representation at the taking of inventory and so far as the record discloses never objected to the inventory and completion specifications approved by the contracting officer. Appellant instead replied (Ex. 9, R. 42) stating it did not desire to complete the work and specifically instructed the contracting officer: "We therefore request that bids be obtained and the contract awarded to the lowest bidder." The invitation for bids

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9. The conttracting officer who executed the original contract on June 24, 1931, was Perry K. Heath, Assistant Secretary of the Treasury. The contract provided (Art. 17 (6), R. 21) that the term "contracting officer" included his duly appointed successor or duly authorized representative. By section 1 of Executive Order No. 6166, June 10, 1933 (5 U. S. C. 132) there was created a Procurement Division in the Treasury Department at the head of which was placed a Director of Procurement, and the office of the Supervising Architect of the Treasury Department was transferred to the new division. Judicial notice may be taken that the Director of Procurement, Admiral G. P. Peoples, who signed Exhibit 9, became thereby the successor to the original contracting officer and that the Acting Director of Procurement, W. E. Reynolds, Assistant Director, who signed Exhibit 12, the completion contract, was the contracting officer's duly authorized representative. **N. Y. & Md. R. R. Co.** v. **Winans**, 17 How. 30, 40; **Cooper v. O'Connor**, (App. D. C.) 99 F. (2d) 135, cert. den. 305 U. S. 643; **Davidson** v. **Payne** (C. C. A. 8) 289 Fed. 69.

to complete the work (Ex. 10, R. 44) and the completion contract (Ex. 11, R. 49) were admitted by the district judge over appellant's objection that the government must first show that the plans and specifications of the completion contract were identical with those of the defaulted original contract (R. 43 and 48). These documents disclose on their face that the new contract was declared by the Acting Director of Procurement, who must be taken to be the authorized representative, if not the successor, of the contracting officer (see *supra,* note 9), to be "for completion of construction of the United States Inspection Station at Babb-Piegan, Montana" (R. 44 and 50).

With the evidence in this state appellant did not challenge the reasonableness and good faith of the determination by the contracting officer or his representative embodied in the completion specifications as to the work necessary to complete the building. On the contrary, appellant expressly agreed (R. 73) as to the amounts of the items properly chargeable to the contractor as involving the completion of the original Grogan contract and of those for work not included in the original contract and indicated throughout the official records to be extra work. Proof of the identity or difference of the work done under the completing contract from that provided for by the Grogan contract could only be made by the official records. The ordinary procedure is by comparing the specifications of the original contract, and the inventory of the state of work thereunder when the Government took over, with the specifications for com-

pletion. See *Zimmerman* v. *Jourgensen,* 24 N. Y. S. 170, 175. Appellant, however, although the government had the documents present in court as part of the 398 page certified photostatic transcript of the official record (R. 34 and 36), made no effort to place the two sets of specifications and the inventory in evidence.[10] Appellant in fact, declined to introduce proof of any point whatever and rested its defense solely on the insufficiency of the government's case on both the law and the facts (R. 74-75).

In this state of the record the government submits that the questions of the correctness of the inventory of the state of work when taken over by the government and of whether the completion contract was for the unperformed part of the defaulted contract were questions of fact as to which appellant is bound under Article 15 of the contract[11] in the absence of clear proof of bad faith or arbitrary conduct by the government officers. The government further submits that appellant's letter (R. 42), directing the contracting office to obtain bids

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10. Government counsel deviated from the frequent practice of itself putting the inventory and specifications in evidence along with the contracts to which they respectively pertain. This was done not only because it is believed they are not an essential part of the government's case in chief, but also out of deference to appellant's general criticism that "we are encumbering the record with unnecessary documents." (See e. g. R. 37).

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11. The provision in question (R. 19) is as follows: "Article 15. **Disputes.**—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed."

and make an award to the lowest bidder, reinforced Article 15 and made the contracting officer appellant's agent for the purpose so that the appellant is bound by his action in the absence of similar proof of bad faith. Accordingly, it is maintained that far from the government being obliged to introduce evidence to negative in advance every possible difference in the completion of specifications from those for the unperformed part of the defaulted contract, appellant was under the duty of showing the decision of the contracting officer and the head of the Department on appeal was not reasonable and in good faith. Finally, even in the absence of these considerations, it is believed that proof of the government's actual cost for completing the abandoned contract is sufficient, since in the absence of any evidence to the contrary it tended to prove what was the reasonable cost of giving the government the finished building it contracted for.

1. *Whether the contracting officer contracted for the completion of the building on the same specifications as the original contract and whether the employment of engineers to supervise completion were necessary were questions of fact on which Article 15 made his determination binding.*—By Article 15 of the contract (R. 19, see *supra,* note 11) the parties agreed that the contracting officer or his representative should decide all disputes concerning questions of fact arising under the contract. The contractor's failure to continue operations, which required the government to take over and arrange to complete

the work, required the contracting officer to make a number of determinations of fact. The contracting officer's approval of the inventory of the state of work, his determination regarding the employment of a construction engineer to supervise the completion, and his issuance of the proposal and specifications for the completion contract which he had to base on the inventory and the original specifications, all constituted decisions on such questions. Accordingly these determinations of the contracting officer are binding on appellant in the absence of proof that its principal or itself had exhausted the administrative appeal to the head of the department provided by the article and that the government's officers were guilty of bad faith or of action so arbitrary and capricious as to be equivalent thereto.

Questions of this character, involving as they do the technical matter of interpretation of the specifications and the question of just what work thereunder was completed by the original contractor and what requires to be done, are matters peculiarly suitable for binding determination by an impartial arbitrator familiar with the special problems. The court have accordingly repeatedly sustained their binding force. As the Court said in *Ogden* v. *United States* (C. C. A. 5) 60 Fed, 725, 726:

> This particular work was in charge of a captain of engineers in the United States Army. No referee more accessible, competent, or impartial could be suggested than such officer should have been. In the absence of fraud, or such gross error or mistake as would imply bad faith, his decisions must be upheld as conclusive on the appellants.

Moreover, appellant was further protected by the right of appeal to the head of the department. As the Supreme Court said in holding such a clause binding in *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387, 393:

> Counsel intimates unfairness on the part of the Supervising Architect, but there is no just foundation for it; and besides, there is no attempt to impugn the good faith of the Secretary of the Treasury who sustained the decision of the Architect, and the contract explicitly provides that the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications shall be final.

It is competent for the parties to leave to the engineer or contracting officer the entire question of the liability of the defaulting contractor and his surety for additional cost or delay damages. *Conneaut Lake Agricultural Assn.* v. *Pittsburg Surety Co.,* 225 Pa. 592, 74 Atl. 620; *American Bonding Co.* v. *Gibson County* (C. C. A. 6) 127 Fed. 671; *Greenbay Lumber Co* v. *Odebolt School Dist.,* 125 Iowa 227, 101 N. W. 84, 87; compare the decision of this Court in *United States* v. *Harris,* 100 F. (2d) 268, 278, that the estimate of damage by the Secretary of the Interior was binding. A fortiori the parties may, as in the U. S. Standard Form Construction Contract here involved, leave to him the final determination of questions of fact on which such liability is founded. While no case involving decisions on questions of fact concerning the preparation of the invitation and specifications for the completion contract has been found, it is believed that this is due to the novelty of appellant's

contention that the government is bound to introduce evidence to negative the absence of any possible difference. It is believed, however, that the matter is obvious on principle. The somewhat similar problem, at the inception of the contract, of whether the surety tendered by the contractor is financially qualified, was held by the Third Circuit to be a question of fact within Article 15 so that the contracting officer's decision was binding. *United States* v. *Iovacchini* (C. C. A. 3) 116 F. (2d) 345, 346.

It is well settled of course that failure to exhaust the administrative remedy by not taking the appeal provided by such clauses is a complete bar to either a defense or a recovery on the ground of error or mistake in the contracting officer's determination. *United States* v. *Ellis,* 2 Ariz. 253, 14 Pac. 300; *American Bridge Co.* v. *United States* (W. D. Pa.) 25 F. Supp. 714, 715; *Bowe* v. *United States* (C. C. Ga.), 42 Fed. 761, 765, *Bray* v. *United States,* 46 Ct. Cls. 132, 138; *Fitzgibbon* v. *United States,* 52 Ct. Cls. 164, 169; *Roberts* v. *Westinghouse Mfg. Co.* (C. C. A. 8), 143 Fed. 218, 224; *United States* v. *Callahan Walker Const. Co.,* 317 U. S. ....., 63 S. Ct. ....., 87 L. Ed. 91, 93. It is equally well settled that an unappealed determination, even if not wisely made, is conclusive upon the contractor, his surety, the government and the Court in the absence of bad faith or arbitrary action implying bad faith. *Chicago & S. F. R. R. Co.* v. *Price,* 138 U. S. 185, 195; *Pauly Jail Bldg. Co.* v. *Hemphill County* (C. C. A. 5), 62 Fed. 699, 704. The fact that there is no proof as to

how the contracting officer reached his decision is immaterial. It is to be presumed that the duty was properly performed. *United States* v. *Harris* (C. C. A. 9), 100 F. (2d) 268, 278. The determination need be only implicit in the action of the contracting officer or engineer in the performance of his regular duties concerning the contract and does not require stating his reasons or making formal findings. His mere written orders or other acts are the exercise of the power. *United States* v. *Shrewsbury, 23 Wall.* 508, 516; *Kihlberg* v. *United States, 97 U. S.* 398, 401. Actual submission of a controversy is not required. *Boettler* v. *Tendrick, 73* Tex. 488, 11 S. W. 497, 499; *Denver S. P. & P. Ry. Co.* v. *Riley, 7* Colo. 494, 4 Pac. 785. Neither notice and hearing nor similar formalities are necessary unless the contract so requires. *Norcross* v. *Wyman,* 187 Mass. 25, 72 N. E. 347, 348; *Sweet* v. *Morrison,* 116 N. Y. 19, 22 N. E. 276, 279.

2. *Not only was appellant as surety bound by the contracting officer's determination because of Article 15, but because appellant made him its agent by giving him specific instructions.*—It appears from Exhibit 8 (R. 42) that on July 23, 1934, appellant wrote to the Director of Procurement, who by the reorganization of the office of the Supervising Architect was then contracting officer as successor in function to Assistant Secretary Heath, advising him that it did not desire to complete the work, but requesting that bids be obtained and the contract awarded to the lowest bidder. It appears further from

Exhibit 10 (R. 44) that the contracting officers' representative did exactly what the appellant requested and advertised for bids for completing the construction of the United States Inspection Station at Babb-Piegan, Montana. It appears further from Exhibit 11 (R. 49) that the contract as let specifically provided it was for completion of the construction of this station.

In the bids, it was recited, of course, that specifications might be obtained from the government and the contract itself required the work to be done according to the prescribed specifications for the completion of construction of the station, which were declared to be part of the contract. The government, in its original contract with Grogan, had likewise required the work to be done according to certain specifications and had these specifications on file for use in taking the inventory. Undoubtedly, the work of completing the defaulted original contract had to be done in accordance with new specifications excluding that part of the work already done, but there is not a scintilla of evidence in the case that the contracting officer did not follow appellant's instructions and have the work of completing the building done under specifications containing the same provisions as those which would have controlled Grogan had he fulfilled his contract and completed the work. It is familiar law that until the contrary is proven it is presumed that an agent just as a public officer will do his duty and follow instructions. Appellant never by pleading nor proof has asserted the contracting officer did otherwise. Both his duty to the government and the instructions of ap-

pellant alike required the contracting officer to relet the contract to the lowest bidder on specifications providing for the same work as had been abandoned. In the absence of clear proof he must be deemed to have done so. *United States* v. *Chemical Foundation,* 272 U. S. 1, 14-15; *Reynolds* v. *United States* (C. C. A. 7), 70 F. (2d) 39, 41, cert. den. 293 U. S. 590; *Arthur* v. *Unkart,* 96 U. S. 118, 122; *Smith* v. *United States* (D. C. Mont.), 32 F. Supp. 657, 659.

Even, however, had appellant shown that the contracting officer made some changes in the specifications, that, of itself, would not have been sufficient to sustain appellant's position that the government's right to additional cost was not sufficiently proven. Appellant would have been required further to prove that the changes were such as to increase the cost of the completion of the work and thus operated to its damage. Changes materially lessening the cost of the work would obviously give appellant no complaint. Apppellant made no contention at the trial, however, that any change to its disadvantage was made in the specifications; on the contrary, appellant freely agreed with government counsel as to what items for which the completing contractor was paid represented extras not in the Grogan contract. There is certainly no presumption that the specifications were changed, or that because of the default of the contractor, the contracting officer in having the work completed built a better or more expensive building for the purpose of mulcting appellant in damages.

The only proof here is that the contracting officer

offered the appellant an opportunity to go ahead and complete the building. The appellant, not content simply to inform the contracting officer that it did not desire to complete the work, went further and directed him to advertise for bids for completing the work and to let the job to the lowest bidder. From the written exhibits referred to, it appears that is exactly what the contracting officer did. His authorized representative, Assistant Director Reynolds, advertised for bids for the completion of the work and let the contract to the lowest bidder. Nothing is said in appellant's letter about the specifications at all. It, therefore, follows that if appellant believes that the contracting officer did not follow the instructions it gave in its letter, appellant must know in what particular its directions were not followed and should have shown by proper proof how the contracting officer did not follow its instructions. Unless appellant did so show, there is no presumption that the contracting officer did not, and appellant cannot, at this stage of the proceedings, without ever having raised the question by pleading or proof, now avoid the government's recovery of its damages by the mere assertion that the contracting officer might possibly not have done his duty and might not have followed appellant's directions or instructions, since the new specifications were "at least different in date." (Appellant's brief, p. 20.)

3. *Aside from special considerations, proof of the actual cost for completing the abandoned contract is sufficient to establish the reasonable cost of giving the government the equivalent of the building for which it contracted.*—Appellant has cited 3 Sutherland, Damages, Sec. 699, and certain other authorities for the proposition that in cases of defective performance of building or construction contracts, the general measure of damages is the reasonable cost of making the work conform to the original contract. The question here, however, is not one of defective performance and therefore of how far it is reasonable to tear out and do over the defective work. The sole question is one of completing the work abandoned by the original contractor.

The correct measure of damages is what will give the government as nearly as possible what it failed to obtain when the contractor defaulted. In the situation involved in the case at bar the same learned author cited by appellant has said (3 Sutherland, Damages (4th ed., 1916) Sec. 698 at p. 2592), "On a contractor's failure to perform in whole or in part the contractee may recover at least the difference between the contract price and the compensation he is obliged to pay under a new contract for the same work." So far as is known this rule has never been questioned. *Goldsboro* v. *Moffet* (C. C. N. C.) 49 Fed. 213, 216; *Mayor* v. *Second Ave. R. R. Co.,* 102 N. Y. 572, 7 N. E. 905, 906; *Dahlstrom Metalic Door Co.* v. *Evatt Const. Co.,* 256 Mass. 404, 152 N. E. 715, 719; *Bacigalupi* v. *Phoenix Bldg. Co.,* 14 Cal. App. 632, 112 Pac. 892; see *United States* v. *McMullen,* 222 U. S. 460, 471.

Whatever may be the rule as to the quantum of proof necessary to show that expenditures for work to remedy defects were reasonable and in accordance with the specifications, appellant has cited no authority holding that proof such as the district court had before it in the case at bar was insufficient to establish the damages for failure to complete the contract work. On the contrary, the only cases dealing even impliedly with the problem appear to indicate that, while the owner may not proceed recklessly, if he proceeds in the usual way and no fraud is shown nor any facts to impeach the reasonableness of the manner in which the abandoned work was done, the sum actually expended for the work is *prima facie* the damages the owner is entitled to recover. In the absence of proof, neither fraud on the defendant, nor recklessness, nor extravagance will be presumed and the actual cost is some evidence of the necessary and reasonable cost.

Thus in *Mayor* v. *Second Ave. R. R. Co., supra,* the railway failed to pave between the car tracks and the city was compelled to do the work and brought suit for the cost it sustained in doing so. The city did not specifically prove that its expenditure was reasonable. Neither does there appear to have been any evidence that the work was done in precisely the same way as the contract required the railway to do it. The railway company objected like appellant in the present case. The Court held the city entitled to recover its actual expenditures in the absence of any proof to the contrary. Similarly in *Bacigalupi* v. *Phoenix Bldg. Co., supra,* the surety contended, precisely as appellant in this case, that plaintiff had not shown the

building was completed in accordance with the original contract nor that its actual cost for completing the abandoned work was a reasonable cost. The Court stated that the evidence did show that the building was completed in accordance with the original contract although it does not appear from the report of just what the evidence consisted and it would seem probable that it was no more than the government's evidence in this case—that the contracts were for the same purpose. As to the question of reasonableness the Court remarked that no evidence had been given that the reasonable cost of completion was any less than what it had actually cost the plaintiff and concluded that in such circumstances evidence of the actual cost was sufficient.[12]

It is submitted that the question of whether the completion contract and the original contract are for the same work is in essence the same sort of question of reasonableness as is the amount of the owner's expenditure. It is elementary that the contractor who abandons the work cannot complain of reasonable changes in the completing contract unless they increase the cost and cannot be separately identified from the original contract work. *Rowe* v. *Peabody,* 207 Mass. 226, 93 N. E. 604, 607; *Delray Lumber Co.* v. *Keohane,* 132 Mich. 17,

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12. Where the contract provides that the excess cost shall be the measure of damages it appears that even proof of want of due care is not sufficient. The defendant must prove bad faith. **Baer** v. **Sleicher** (C. C. A. 6) 153 Fed. 129, 132-133; **Mass. Bonding & Indemnity Co.** v. **John B. Thompson** (C. C. A. 8) 88 F. (2d) 825, 830, cert. den. 301 U. S. 707. Expert testimony as to reasonable cost is irrelevant. Riley v. **Kenney,** 33 Misc. 384, 67 N. Y. S. 584, 585; **Zimmerman** v. **Jourgensen,** 14 N. Y. S. 548, 549, further pro. 24 N. Y. S. 170.

92 N. W. 489; *Board of Education* v. *Maryland Casualty Co.* (C. C. A. 3), 27 F. (2d) 20; cf. *Christopher Co.* v. *Yeager,* 202 Ill. 486, 67 N. E. 166, 168. It would seem no more than consistent to require the defaulting contractor or his surety to present at least some evidence that a change was made which was not reasonable or which increased the cost.

In the case at bar such a requirement would seem particularly reasonable. Not only is there not a scintilla of evidence that there were any material changes in the specifications for the completion contract, but appellant expressly agreed as to the amounts paid to the completing contractor which represented extra work not chargeable to Grogan's abandonment of the original contract (R. 73). If appellant could do this, apparently, simply by an inspection of the certified transcript of official records, it would not seem an undue burden to require him to point out any differences in the specifications in the same way. If it needed more time to examine the documents, it had every right and facility under Rule 35 to require production of the specifications before trial to permit comparison by its principal or any other builder or qualified expert.

In addition to the objection that the government has not affirmatively shown there were no deviations in the completion contract specifications from those for the abandoned part of the original contract, appellant adds at page 20 of its brief, although without much emphasis, that there was no proof "that the payments to Lavine and the other engineers were made because reasonably

necessary in connection with the completion of that station." Appellant does not contest the fact that the payments were actually made. That, it conceded at the trial (R. 73-74). It does not suggest even now in what respect it considers any part of the payments were not reasonably necessary. It simply asks that the proofs be reinforced.

The government submits that what has been said above on the general question of proof of reasonableness sufficiently disposes of this objection. It may be emphasized, however, that appellant presumably knew that a construction engineer had been at the site of the work throughout the time Grogan was actually working on the job and that it is the usual practice on all public works of any importance, whether state or federal. Appellant was notified by the contracting officer's letter (Ex. 8, R. 41) that the government would be required to send an engineer on the premises to take an inventory of the state work. Appellant in its reply made no objection and never claimed it was unnecessary. Since there is no presumption that the contracting officer would improperly order something unnecessary and appellant did not at the trial attempt to point out in what particulars the presence of the engineers was not necessary, appellant cannot now have the findings of the Trial Court set aside as unsupported. If such contentions have substance and merit, the time to present them is at the trial.

III

The United States was entitled to the allowance of interest from the date of the earliest demand for payment upon the whole of the damages awarded.

Appellant finally contends that the District Court erred in allowing interest upon the amounts of the recovery. In cases of contract default interest runs from the date of demand upon defendant for payment. *Miller* v. *Robertson,* 266 U. S. 243, 257; *United States Fidelity & Guaranty Co.* v. *United States,* 236 U. S. 512, 528-531; Restatement, Contracts, Sec. 337. The action is ex contractu, and the Supreme Court of the United States had occasion recently to consider the question of the applicability of the rule in *United States* v. *Sanborn,* 135 U. S. 271, relied upon by the appellant. In *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 296, the Court rejected the application of the equitable rule in cases of express contracts, saying:

> Here, responsibility for delay in payment rests quite as much upon the debtor, who is chargeable with knowledge of its own obligation and the breach of it, as upon the creditor. And in the meantime the debtor has had the use of the money, of which its default has deprived the creditor. Interest upon the principal sum from the date of default, at a fair rate, is therefore an appropriate measure of damage for the delay in payment. (Citing cases.)

CONCLUSION

It is accordingly believed that on the record here, the United States has shown it was compelled to institute and prosecute this litigation because of the wrongful failure and refusal of the contractor and the appellant to perform their obligations to the government; that all the government asked in its suit was that it be made whole for the damage it sustained because of those wrongful acts of the contractor and the appellant; that the judgment entered by the Trial Court went no further than to enforce the obligations of the contractor and the appellant by making the government whole; and that no reason has been advanced which shows that this result reached by the Trial Court was not proper. It is therefore respectfully submitted that the Court below committed no error that in anywise adversely affected any material or substantial right of appellant and the judgment is correct and just and should be affirmed in toto.

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